

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRISTOBAL RIOS-CONTRERAS,

Defendant.

NO: 1:10-CR-2094-RMP

ORDER DENYING
DEFENDANT'S MOTION UNDER
28 U.S.C. § 2255

BEFORE THE COURT is Defendant's Motion to Vacate Judgment under 28 U.S.C. § 2255, ECF No. 76. The Court has reviewed the motion and the record and is fully informed.

Defendant previously filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, ECF No. 59, and this Court denied that motion. *See* ECF No. 61. Defendant filed his present, successive petition on June 27, 2016. ECF No. 76.

Pursuant to 28 U.S.C. § 2255,

[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

1 (1) newly discovered evidence that, if proven and viewed in light of the
2 evidence as a whole, would be sufficient to establish by clear and
3 convincing evidence that no reasonable factfinder would have found
4 the movant guilty of the offense; or (2) a new rule of constitutional law,
5 made retroactive to cases on collateral review by the Supreme Court,
6 that was previously unavailable.

7 The statutory reference to 28 U.S.C. § 2244 refers to the requirement that “[b]efore
8 a second or successive application permitted by this section is filed in the district
9 court, the applicant shall move in the appropriate court of appeals for an order
10 authorizing the district court to consider the application.” 28 U.S.C. §
11 2244(b)(3)(A).

12 Defendant filed his pro se motion with this Court without having moved in
13 the Ninth Circuit Court of Appeals. Therefore, this Court is without jurisdiction to
14 consider his arguments.

15 **Certificate of Appealability**

16 An appeal of this Order may not be taken unless a circuit justice or judge
17 issues a certificate of appealability (COA). 28 U.S.C. § 2253. The Court may only
18 issue a COA “if the applicant has made a substantial showing of the denial of a
19 constitutional right.” *Id.* The U.S. Supreme Court held that

20 when the district court denies a habeas petition on procedural grounds
21 without reaching the prisoner’s underlying constitutional claim, a COA
should issue (and an appeal of the district court’s order may be taken)
if the prisoner shows, at least, that jurists of reason would find it
debatable whether the petition states a valid claim of the denial of a
constitutional right, and that jurists of reason would find it debatable
whether the district court was correct in its procedural ruling.

1 *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

2 Defendant has failed to provide reason to believe that any jurist of reason
3 would find that his petition is not “second or successive” and that he has failed to
4 move in the Circuit Court. Therefore, the Court finds no basis to issue a certificate
5 of appealability.

6 In addition, the Court notes that Defendant bases this subsequent § 2255
7 motion on the Supreme Court’s decision in *Johnson v. United States*, 135 S.Ct.
8 2551 (June 26, 2015). Even if the Court were to have jurisdiction over
9 Defendant’s current § 2255 motion, which the Court finds that it does not, the
10 Court finds that *Johnson* is not applicable in Defendant’s situation. In *Johnson*, the
11 Supreme Court held that the residual clause of the Armed Career Criminal Act
12 (ACCA) was unconstitutionally vague in violation of the Due Process Clause of
13 the Fifth Amendment to the U.S. Constitution. *Id.* at 2557. However, Mr. Rios-
14 Contreras was not subject to the Armed Career Criminal Act and the residual
15 clause constituted no part of this Court’s sentencing decisions. Therefore, nothing
16 about *Johnson* is applicable to this case and its holding cannot be a basis for this
17 Court to resentence Defendant.

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to
2 Vacate Judgment under 28 U.S.C. § 2255, **ECF No. 76**, is **DENIED**.

3 The District Court Executive is hereby directed to enter this Order and
4 provide copies to counsel and Defendant.

5 **DATED** this 28th day of 2016.

6 s/ Rosanna Malouf Peterson
7 ROSANNA MALOUF PETERSON
8 United States District Judge
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